

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

JAN - 2 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications for **DOCKET FILE COPY ORIGINAL**

The Lutheran Church/
Missouri Synod

For Renewal of Licenses of
Stations KFUE/KFUE-FM,
Clayton, Missouri

) MM Docket No. 94-10
)
) File Nos. BR-890929VC
) BRH-890929VB

TO THE COMMISSION

**REPLY TO "RESPONSE" TO MOTION TO
VACATE OR DELETE REPORTING CONDITIONS**

The Missouri State Conference of Branches of the NAACP, the St. Louis Branch of the NAACP and the St. Louis County Branch of the NAACP (collectively, "the NAACP") respectfully replies to the December 30, 1997 "Response to Motion to Vacate or Delete Reporting Conditions" ("Response").

The Church does not dispute any of the facts relied on in the Motion, and it claims to be "gratified that the NAACP now recognizes that 'the Church has been successful in recruiting minorities' and has engaged in 'the kind of outreach the Commission encourages.'" ^{1/} Response at 1. Yet now the Church surprisingly interposes obviously frivolous objections ^{2/} to very same relief it

^{1/} The Church couples this statement with a contention that the EEO reporting conditions "should never have been imposed[.]" On the record of the Church's grave misconduct during the 1983-1990 renewal term, the imposition of the EEO reporting conditions was necessary and proper, and the Church was fortunate to have kept its licenses at all. The NAACP's Motion was limited to whether the reporting conditions are gratuitous in light of subsequent developments.

^{2/} The NAACP's Motion is not a "belated" petition for reconsideration of the issuance of the reporting conditions. Response at 2. A party may bring new evidence to an agency's attention at any time. Nor is there any merit to the Church's suggestion that the NAACP is no longer a "party" and lacks standing. Id. at 3. A party before an agency continues to enjoy party status before the agency until the agency's decision attains finality, as long as the party intervenes in the appeal. The NAACP has done so.

0414

has sought itself from Commission and the Court.^{3/}

The Church has changed its mind in arguing now that only the D.C. Circuit "has clear jurisdiction over the reporting conditions." Response at 2. The Church was correct before and incorrect now. The Court has jurisdiction over whether, on the record now before the Court, the reporting conditions were lawfully imposed. But this Commission has always had jurisdiction over the question of whether subsequent events not in the record, and not previously considered by the Commission, should result in vacating the conditions for reasons not germane to the appeal. The equitable impact of the Church's post-1990 conduct is not "a material aspect of the pending appeal";^{4/} indeed, it is not tied to any question before the Court. Consequently, a remand is not

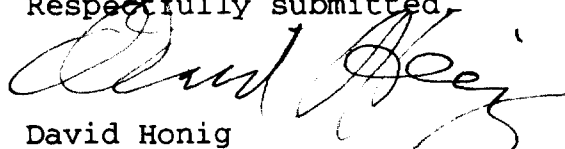
^{3/} Recall that the Church itself recently asked the Commission to stay the reporting conditions, then criticized the Commission for having denied its stay request while the Commission sought a remand from the Court.

The Church cannot object to a proposal that the Commission delete remedial reporting conditions, and simultaneously argue in the D.C. Circuit that it is somehow "aggrieved" by the Commission's continued intention to enforce those conditions. If the Church is not really aggrieved by the reporting conditions, it lacks "a legally cognizable interest in the outcome," Powell v. McCormack, 395 U.S. 486, 496 (1969), and it should dismiss its appeal at once. A party seeking to invoke the jurisdiction of a court of appeals must suffer genuine, current harm. Courts do not adjudicate merely ideological disputes. U.S. Const., Article III, §1. A court of appeals does not "give opinions upon moot questions or abstract propositions, or...declare principles or rules of law which cannot affect the matter in issue in the case before it." Mills v. Green, 159 U.S. 651, 653 (1895). As Justice Scalia has written, the "case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. To sustain our jurisdiction...it is not enough that a dispute was very much alive when suit was filed, or when review was obtained in the Court of Appeals....The parties must continue to have a 'personal stake in the outcome' of the lawsuit...." Lewis v. Continental Bank Corp., 494 U.S. 472, 1253-54 (1990) (citations omitted) (Opinion of Scalia, J.)

^{4/} Response at 2.

necessary in order for the Commission to consider the NAACP's Motion and thereby essentially put an end to this litigation.^{5/}

Respectfully submitted,



David Honig
3636 16th Street N.W. #B-366
Washington, D.C. 20010
(202) 332-7005

Counsel for The Missouri State
Conference of Branches of the NAACP, the
St. Louis Branch of the NAACP and the
St. Louis County Branch of the NAACP

January 2, 1998

5/ The Church's real fear is that its court case, in which it is brazenly attempting to turn the civil rights clock back 50 years through judicial repeal of even race-neutral recruitment-based programs, "may become moot on appeal by the occurrence of subsequent events." Henco, Inc. v. Brown, 904 F.2d 11 (7th Cir. 1990) (expiration of preliminary injunction moots appeal). See also Bahn Miller v. Derwinski, 923 F.2d 1085, 1088-89 (4th Cir. 1991) ("[w]ithdrawal or alteration of administrative policies can moot an attack on those policies"); United States v. \$2,490.00, 825 F.2d 1419 (9th Cir. 1987) (court of appeal's jurisdiction over appeal from forfeiture order ends when the money is deposited in United States Treasury); Wilmington Firefighters Local 1590 v. City of Wilmington, 824 F.2d 262 (3d Cir. 1987) (appeal from grant of summary judgment concerning promotion list in race discrimination case rendered moot when list expired without any promotions having been made from it).

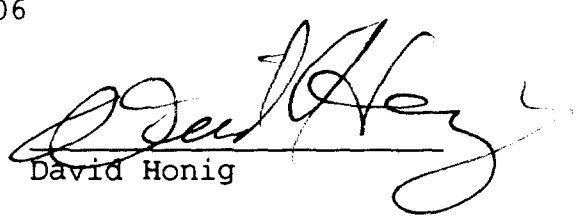
CERTIFICATE OF SERVICE

I, David Honig, hereby certify that I have this 2nd day of January, 1998 caused a copy of the foregoing "Reply to 'Response' to Motion to Vacate or Delete Reporting Conditions" to be delivered by fax and by U.S. First Class Mail, postage prepaid, to each of the following:

Roy J. Stewart, Esq.
Chief
Mass Media Bureau
Federal Communications Commission
1919 M Street N.W. #314
Washington, D.C. 20554

Y. Paulette Laden, Esq.
Chief, EEO Branch, Enforcement Division
FCC Mass Media Bureau
2025 M Street N.W. #7218
Washington, D.C. 20554

Richard Zaragoza, Esq.
Kathryn Schmeltzer, Esq.
Fisher Wayland Cooper Leader & Zaragoza
2001 Pennsylvania Avenue N.W., Suite 400
Washington, D.C. 20006


David Honig